March 9, 2006

EX PARTE SUBMISSION

Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, D.C. 20554

Re: AU Docket No. 06-30

Dear Ms. Dortch:

Tom Sugrue, Vice President-Government Affairs of T-Mobile USA, Inc. ("T-Mobile"), and Peter Cramton, Professor of Economics at the University of Maryland, on behalf of T-Mobile, submit this letter in response to the Ex Parte Submission of the Department of Justice (the "Department") made on March 3, 2006 in the above referenced proceeding.

In its ex parte filing, the Department expresses support for the proposal in the Wireless Bureau's Public Notice[1] to use secret bidding in Auction No. 66. Surprisingly, it bases this position largely on its analysis of Auction No. 11, which closed more than nine years ago. For the reasons set out below, the Department's analysis is flawed, and its reliance on the results of Auction No. 11 to support non-transparent bidding in Auction No. 66 is completely misplaced. Moreover, the Department misstates the results of investigations by the FCC and the Department itself of certain Auction No. 11 bidding conduct. If the Department has harbored concerns about the Commission's transparent bidding practices, it has had ample opportunity to voice them before, during or after any of the fifty wireless auctions that have been conducted since Auction No. 11.[2] Equally puzzling is its failure to examine the data from the auctions conducted after the FCC implemented the Department's own recommended reforms following Auction No. 11.[3]

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[1] FCC Public Notice, *Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedures*, AU Docket No. 06-30, DA 06-238 (rel. Jan. 31, 2006).

[2] For example, in the case of Auction No. 35, the Department was heavily involved in reclaiming many of the subject licenses from bankruptcy and, presumably, should have had every incentive to raise the bidder-information policy issue to which the Department now attaches such high importance.

[3] One would expect that the DOJ, having thoroughly examined the bidding behavior in Auction No. 11 and recommended auction reforms, would have examined the market data at some point during the past nine years to determine the effectiveness of the reforms. The fact that the Department makes no mention of any post-Auction No. 11 auctions, other than one isolated example from Auction No. 58, suggests that the Department has not

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In fact, the Department acknowledges that, since Auction No. 11, the FCC has "adopted other mechanisms to reduce opportunities for collusion."[4] These reforms have been successful in mitigating tacit collusion in fully transparent auctions and include: 1) limiting the number of bid withdrawals; 2) eliminating trailing digits in bids by requiring bidding in a number of formula-based bid increments, from 1 to 9, for each license; 3) using a reserve price representing a significant fraction of the projected license value; and 4) managing the auction pace through larger bid increments. We are aware of no empirical evidence from more recent auctions that would support a conclusion that full transparency has facilitated collusion, harmed efficiency or reduced auction revenues.

Although the Department acknowledges that important refinements have been made to the auction rules, it nonetheless attempts to find instances of collusive bidding in auctions since Auction No. 11. This exercise bears virtually no fruit. Indeed, the Department comes up with a single purported example of bidding in one BTA in a recent auction -- Roanoke, VA in Auction No. 58 -- to support its contention that non-transparent bidding should be instituted for Auction No. 66. The Department argues that "anomalous"[5] or collusive bidding behavior caused the winning bid on one of the three licenses in this BTA to exceed the bids on the other two licenses. Contrary to these conclusory claims, it was virtually a statistical certainty that the bid on *one* of the licenses would exceed the other two. Moreover, there may have been any number of reasons why the bidders behaved the way they did in the rounds in question, which came at the last stages of the auction. In short, the Department's assertions of collusion are highly conjectural, ultimately prove nothing and, in particular, provide no basis for the dramatic change in auction procedures they advance.

More significantly, the Department mischaracterizes the *Mercury PCS* case which arose after Auction No. 11 in an effort to support its assertion that tacit collusion can adversely affect competitive forces during an auction. The Department suggests that the FCC issued a fine in this case, when, in fact,[6] the FCC ultimately rescinded in its entirety the Notice of Apparent Liability claim against Mercury.[7] Furthermore, despite the Department's statement that Mercury's conduct was also the basis for a Department enforcement action,[8] that civil action ended in what

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conducted any such study. Curiously, the FCC and the Department considered bidder-information policy at the time they implemented the other reforms but chose not to restrict bidder information until the current proposal.

[4] Department Letter at 10. The FCC's design and implementation of the auction reforms can be credited, in part, to the recommendations of Professor Cramton.

[5] *Id.* at 8.

[6] *Id.* at 4 ("The FCC fined Mercury PCs for engaging in this type of 'reflexive' or code bidding . . . .").

[7] The FCC reasoned that its interpretation of Section 1.2105(c) and "the Wireless Telecommunications Bureau's neutral pronouncement immediately following the initial allegation of reflexive bid signaling" had not afforded Mercury and the other bidders notice that reflexive bidding was prohibited. *Mercury PCS, LLC,* 13 FCC Rcd 23755 ¶ 10 (1998).

[8] *See* Department Letter at 4.

amounted to a "slap on the wrist" -- a Final Judgment that prohibited Mercury from entering into anticompetitive agreements when participating in future FCC auctions and required Mercury to establish and maintain an anti-trust compliance program.[9] The Department, however, did not pursue any criminal action to impose any fine or other penalty. This case simply does not support the application of sweeping non-transparency rules in FCC auctions more than nine years after-the-fact. The reality is that, after extensive investigations, both the FCC and the Department took no serious action against Mercury or other Auction No. 11 participants. Using this case as the basis for a change today is more than a stretch; it is just plain wrong.[10]

The Department's assertion that Professor Cramton's conclusions about Auction No. 66 are inconsistent with his statements about Auction No. 11 is also wrong. Professor Cramton's recommendation to the Department and his subsequent writings consistently presented a balanced view on the issue of transparency, just like his comments in this proceeding. His recommendation in 1997 to the Department and the FCC, after extensive analysis of the 23,157 bids in Auction No. 11, was to continue with full transparency, but take steps to mitigate the possibility of tacit collusion by a number of rule changes. This recommendation was endorsed by the Department and subsequently implemented by the FCC.

As the Department can surely appreciate, competition best protects against tacit collusion, and any costs of full transparency quickly fall with the level of competition. As T-Mobile has stated, if the FCC does choose to conceal bidder identities, it should do so only if the initial eligibility ratio at the time of the upfront payment deadline is less than two (2). Experience from the FCC spectrum auctions suggests that an auction with an eligibility ratio of two or more will be competitive, and therefore the benefits of transparency will outweigh the risks of any potential collusive behavior in this case.

In the absence of any compelling evidence of harm from continued use of transparency, the FCC should not experiment with untested, unproven methodologies in Auction No. 66. Auctions of CMRS spectrum over the past several years have been very successful by any measure, achieving or even exceeding market value for the licenses auctioned. These undeniable results strongly support continued use of full transparency in the upcoming AWS auction.

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[9] *See United States v. Mercury PCS II LLC*, Civ. No. 98-2751 (PLF), 1999 WL 1425379 (D.D.C. entered April 29, 1999).

[10] The appropriate response to Mercury's conduct (code bidding) in Auction No. 11 was to introduce a rule change that prevents such behavior in future auctions. This is exactly what the FCC did following Auction No. 11.

Pursuant to section 1.1206(b) of the Commission's rules, an electronic copy of this letter is being filed.

Sincerely,

/s/ Thomas J. Sugrue
Vice President - Government Affairs, T-Mobile

T-Mobile USA, Inc.

/s/Peter Cramton
Professor of Economics, University of Maryland

cc: Leslie Marx
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